78-1639

IN THE

Supreme Court of the United States

October Term 1978

NO. 78-

DR. JOHN E. MORRISON, JR.,
DR. DAVID E. GRAHAM,
DR. NEWTON C. GALUSHA,
Petitioners

V.

HONORABLE JOHN STETSON
SECRETARY OF THE AIR FORCE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

Index Continued

TABLE OF AUTHORITIES

Cases:

Statutes:

Index Continued

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This petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the District of Columbia Circuit, which affirmed an earlier order entered in the District Court of the District of Columbia. That order denied petitioner's motion for summary judgment and granted respondent's motion for summary judgment.

OPINIONS BELOW

A panel of the Court of Appeals for the District of Columbia Circuit heard argument on January 18, 1979; and on January 29, 1979, entered a judgment which affirmed the order of the District

Court. No opinion was filed by the Court of Appeals, which stated that it was in agreement with the memorandum opinion filed on February 1, 1978 by District Julge Oliver Gasch. That opinion, which is unpublished, is reproduced in the Appendix to this Petition at A-3.

JURISDICTION

The decision of the panel of the Court of Appeals was entered on January 29, 1979. This petition is timely filed within 90 days of the entry of the judgment in the Court of Appeals. Jurisdiction to review this case is conferred on the Court by 28 U.S.C. § 1254(1) (1976).

QUESTION PRESENTED

Did the Court below err in allowing respondent to hold petitioner medical officers on active duty for more than two years contrary to 50 U.S.C. App. § 454(1)(1) and their agreements with the Air Force?

STATUTES INVOLVED

50 U.S.C. App. § 454(1)(1976)

(1) The President may order to active duty (other than for training), as defined in section 101(22) of title 10, United States Code, for a period of not more than twenty-four consecutive months, with or without his consent, any member of a reserve component of the Armed Forces of the United

States who is in a medical, dental or allied specialist category, who has not attained the thirty-fifth anniversary of the date of his birth, and has not performed at least one year of active duty (other than for training). This subsection does not affect or limit the authority to order members of the reserve components to active duty contained in section 672 of title 10, United States Code.

(2) For the purposes of computation of the periods of active duty (other than for training) referred to in subsection (1), credit shall be given for all periods of one day or more performed under competent orders, except that no credit shall be allowed for periods spent in student programs prior to receipt of the appropriate professional degree or in intern training.

(3) Any person who is called or ordered to active duty (other than for training) from a reserve component of the Armed Forces of the United States after September 5, 1950, and thereafter serves on active duty (other than for training) as a medical, dental, or allied specialist for a period of twelve months or more shall, upon release from active duty or within six months thereafter, be afforded an opportunity to resign his commission from the reserve component of which he is a member unless he is otherwise obligated to serve on active military training and service in the Armed Forces or in training in a reserve component by law or contract.

(4) Any physician or dentist who meets the qualifications for a Reserve commission in the respective military department shall, so long as there is a need for the services of such a physician or dentist, be afforded an opportunity to volunteer for a period of active duty (other than for training) of not less than twenty-four months. Any physician or dentist who so volunteers his service, and meets the qualifications for a Reserve commission shall be ordered to active duty (other than for training) for not less than twenty-four months, notwithstanding the grade or rank to which such physician or dentist is entitled.

STATEMENT OF THE CASE

The petitioners are Air Force medical officers, who were initially commissioned as reserve officers through the Air Force Reserve Officers Training Corps ("AFROTC") program. They sought a judgment declaring that as medical officers they are only obligated to serve two years of active duty, rather than the four years of active duty for which the Air Force is holding them. Since petitioner Morrison had already served more than two years of active duty when this action was commenced, he also asked for relief in the nature of habeas corpus in order to obtain his immediate release from active duty.

The action was brought by petitioners as a class action in behalf of themselves and of the many other Air Force medical

officers who are similarly situated. However, after respondent had answered, it was stipulated, with approval of the District Court, that the action would proceed solely in behalf of petitioners and that respondent would withdraw any defense of exhaustion of remedies. Cross-motions for summary judgment were filed; and, after hearing argument, District Judge Oliver Gasch granted respondent's motion and dismissed the action. Petitioners appealed unsuccessfully to the Court of Appeals, which affirmed without opinion.

As Judge Gasch has noted in his Memorandum Opinion, the material facts are not in dispute. Each of the petitioners enrolled in an approved AFROTC program during 1966 and 1967. At that time, each executed an Air Force Form 1056, wherein he agreed to serve on active duty for four years if commissioned as an officer. This Form, entitled "Air Force Reserve Officers Category Agreement", also provided for delay of active duty until the completion of professional studies but did not indicate whether such delay would alter the four-year active duty requirement.

Upon completion of the AFROTC program, each petitioner received orders for appointment as a second lieutenant in the Air Force Reserve. Each appointment was effectuated by means of an Appointment Letter, Oath of Office, and Appointment Order. However, before receiving his appointment, each petitioner applied for and was granted an educational delay to study medicine before

entry on active duty. These studies of medicine were undertaken solely at the expense of petitioners and without any government assistance.

After completing medical school, each petitioner became eligible to be commissioned as a medical officer in the Air Force Reserve. Accordingly, each received a new Appointment Letter, which tendered an indefinite term appointment as a Reserve of the Air Force in the grade of "First Lieutenant (Medical Corps)". This Letter stated that acceptance of the appointment tendered "will vacate your present Reserve of the Air Force appointment". Each petitioner was also required to execute a new Oath of Office -- this time as a "First Lieutenant, Medical Corps" in the Reserve of the Air Force. After acceptance of the appointment that had been tendered, each petitioner received an Appointment Order, which specifically provided that his previous appointment as a line officer was "vacated".

After being appointed as medical officers in the Air Force Reserve, each petitioner received further educational delay so that he could complete post-graduate medical training -- this training also being performed without any support from the government. In 1975 petitioner Morrison was ordered to four years' extended active duty. In 1976 petitioners Galusha and Graham were similarly ordered. Petitioners commenced their action in 1977.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

1. The Decision of the Court Below Was in Conflict With Decisions of This Court That a Federal Statute Cannot Be Overruled by Military Regulations.

In United States v. Larionoff, 431 U.S. 864, 97 S. Ct. 2150, 53 L.Ed. 48 (1977), this Court recently reaffirmed that:

> "For regulations, in order to be valid, must be consistent with the statute under which they are promulgated". (431 U.S. at 873).

Contrary to this well-established principle, the courts below disregarded the express provisions of 50 U.S.C. App. § 454(l)(1) by holding that, under Air Force Regulations, the petitioners were obligated to serve four years of active duty as medical officers.

This statute states that the President may order to active duty for a period of not more than twenty-four consecutive months any member of a reserve component of the Armed Forces of the United States who is in a medical, dental, or allied specialist category; is not thirty-five years of age; and has not performed at least one year of active duty (other than for training). All of the petitioners are medical officers - so designated and appointed by the Air Force. If the President -- who under

Article Two of the United States Constitution is Commander-in-Chief of the armed forces and is vested with the Executive Power -- cannot do so, then it is obvious that his subordinates, such as the respondent Secretary of the Air Force, have no authority to order petitioners to active duty for more than twenty-four consecutive months. Therefore, in holding petitioners on active duty for more than twenty-four consecutive months against their wills,[1] respondent Secretary violated a clearly applicable federal statute; and such a violation cannot be justified by any regulations issued by respondent or his predecessors in office. United States v. Larionoff, supra.

In District Judge Gasch's Memorandum Opinion, which was later adopted by the Court of Appeals, he acknowledges that:

> "On its face, the provision [50 U.S.C. App. § 454(l)(1)] appears to support plaintiffs' position". (A-13).

However, he went on to conclude, from "a reading of the provision in context and

[1] Petitioner Morrison had been held on active duty for more than two years when the action was commenced. All of the petitioners are now being held on active duty involuntarily after having served for twenty-four consecutive months.

an examination of its legislative history", that it was not intended to apply to medical officers who are AFROTC graduates.

The "context" on which Judge Gasch relied is 50 U.S.C. App. § 454(l)(3). This statute allows a medical or dental officer who has served on active duty for twelve months or more to resign his commission thereafter, "unless he is otherwise obligated to serve on active military training and service in the Armed Forces or in training in a reserve component by law or contract". Under the most rudimentary canons of statutory construction, the circumstance that 50 U.S.C. App. § 454(l)(3) contains such an exception but that 454(l)(1) -- enacted at the same time -- contains no such exception, suggests that Congress did not intend to create any exception to the twenty-four month limitation on the President's power. Similarly, the express exception provided in § 454(l)(1) for orders to active duty under 10 U.S.C. § 672 indicates that no other exception was intended by implication.

The "legislative history" on which Judge Gasch relied was contained in an exhibit to respondent's motion for summary judgment. However, that entire lengthy document has not a single passage stating that the President may order to active duty for four years -- rather than only for two years -- those medical officers in the Reserve who had previously been commissioned under the AFROTC program. Certainly Congress was aware that a person appointed as a medical officer in the Air Force Reserve

might already hold a commission; P.L. 85-861, § 1(178)(A), 72 Stat. 150, enacted on September 2, 1958 -- only a year after 50 U.S.C. App. § 454(l)(1) -- deals specifically with this possibility. Even so, not a single legislator intimated that because of obligations incident to his previous commission a medical officer in the Reserve might be ordered to active duty for more than twenty-four consecutive months.

The courts below also disregarded the Air Force's own administrative interpretations and practice, which made clear that the plain meaning of 50 U.S.C. App. § 454(l)(1) should apply to petitioners. On December 20, 1963, the Air Force sent to all Detachments of the AFROTC a message which stated in paragraph 3 thereof:

> "All AFROTC commissionees are held to their contractual agreement (four or five years of extended active duty depending on their category) except those who later complete medical, dental, or veterinary school and are re-appointed in the Medical Service Corps. This exception is in keeping with Public Law 497, 84th Congress. Medical, dental and veterinary officers are ordered to active duty as captains in the USAF Reserve for a minimum period of two years.

> The four-year active duty commitment incurred by completion of the AFROTC program is abrogated by the provisions of PL 497". (Emphasis supplied).

This same interpretation had been stated by the Air Force on at least one prior occasion -- namely, on August 14, 1962.

The Air Force procedure used in reappointing the three petitioners and several hundred others who graduated from AFROTC and thereafter attended medical or dental school -- a procedure specified in Air Force Manuals -- is in the same vein. The Appointment Letter and the Appointment Order state that any existing appointment is "vacated". "Vacating" the initial AFROTC appointment as a line officer conforms to the Air Force's interpretation on December 20, 1963 that a four-year AFROTC active duty commitment is "abrogated" upon reappointment as a medical officer.

Under 5 U.S.C. § 3331 (1976), an oath of office is required before one enters upon the duties of an office under the Government of the United States. However, 10 U.S.C. §§ 8312, 8394, and 8451 do not require a new oath of office when an Air Force officer is promoted. By having a new Oath of Office executed as part of petitioners' reappointment as a medical officer, the Air Force emphasized that they were entering upon an entirely new office and that the obligations incident to the old office -- and the earlier AFROTC appoint-

ment as line officers -- were "abrogated".

In short, Congress in 1957 enacted a law which in plain language placed a two year ceiling on the active duty that could be required of petitioners -- and of several hundred other Air Force medical officers who were similarly situated. The Air Force initially recognized that clear intent and created administrative procedures conforming to that intent. Those procedures, which have been applicable for many years, were utilized in reappointing the petitioners as medical officers in the Air Force Reserve. However, because of its need for doctors and dentists, the Air Force has attempted to override Congressional intent. As in United States v. Larionoff, supra, this attempt must be rebuffed. In failing to do so, the decision of the court below was in conflict with the applicable decisions of this Court.

II. In Its Interpretation of the Agreement Between Petitioners and the Air Force, the Decision of the Court Below Was in Conflict With Applicable Decisions of This Court And of Other Federal Courts.

In our discussion of 50 U.S.C. App. § 454(l)(1), it was pointed out that the administrative procedure used by the Air Force in reappointing petitioners as medical officers supports petitioners' interpretation of that statute. In addition, the procedure employed by the Air Force evidenced its agreement that petitioners would only be subject to obligations for active duty under their new

appointments as medical officers and would no longer be subject to obligations based on their initial appointments under the AFROTC program as Air Force Reserve line officers.

The Appointment Letter and Appointment Order furnished to each petitioner by the Air Force provided that earlier appointments were "vacated". Although the wording of the Appointment Letter and the Appointment Order were specified by the Air Force's own directives, neither document stated -- or even intimated -- that the petitioners would be subject to a four-year active duty commitment connected with their earlier AFROTC appointments.

As this Court has made clear, military law views one appointment or enlistment as separate from another; and a member of the Armed Services does not carry over from a prior enlistment or appointment the obligations or liabilities incurred during that earlier service. Thus, an accused may not be tried by court-martial for alleged offenses committed during a prior enlistment. Hirshberg v. Cooke, 336 U.S. 210, 69 S. Ct. 530, 93 L. Ed. 621 (1949).

In line with this principle, the Court of Claims held that the Air Force could not predicate an administrative discharge on alleged misconduct during an earlier enlistment. Murray v. United States, 154 Ct. Cl. 185 (1961). The only case of which we are aware involving the same question presented in the case at hand is Cook v. Helder et al, (Civ. No. S-2962), decided in 1973 in

the Eastern District of California. That case held that an Air Force dental officer who had originally been appointed under the AFROTC program as a line officer in the Reserve, but thereafter had been reappointed as a dental officer, was subject only to two years active duty.[2]

Thus, the decisions, both in this Court and the lower federal courts, establish that reappointment -- especially when accompanied by a new Oath of Office and Appointment Orders which "vacate" any earlier appointment -- abrogates obligations incurred under any prior appointment. The slate is wiped clean!

As a matter of federal contract law, it seems clear that the petitioners and the Air Force contracted with respect to this well-established principle of military law. At the least, the Air Force -- which drafted every document involved in the original appointments and the reappointments -- should have announced any intention not to follow the usual rules of military law. Having attempted to bind petitioners to four years active duty by its "Category Agreement", the Air Force cannot complain when that Agreement was abrogated by the Air Force's own actions.

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[2]The Government gave notice of appeal; but an appeal was never perfected and the dental officer was released from active duty.

Each of the petitioners went through medical school and post-graduate training at his own expense. The Air Force, however, receives the benefit of that extra training. The duties to be performed as a medical officer have almost nothing to do with any duties for which petitioners were trained in AFROTC. Under these circumstances it is quite equitable to apply to the agreement between petitioners and the Air Force the principle -- recognized by this Court and other federal courts -- that a new appointment or enlistment supersedes obligations and liabilities under a prior appointment or enlistment.

III. This Case Presents An Important Question of Federal Law Which Should Be Settled by This Court.

The question presented in this case is important to the petitioners because it concerns the petitioners' liberty -- whether they must serve two more years on active duty than was required of military doctors who had not participated in the AFROTC program.[3] Also, the question is important to several hundred other Air Force doctors who, over the years, have been required to serve two extra years of active duty by reason of earlier participation in AFROTC.

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[3]All of the petitioners have already been held for more than two years of active duty. However, to the extent such retention was unauthorized, they would have a claim for extra pay under the Variable Incentive Pay program for doctors in the Armed Forces.

However, the importance of the question presented goes still further and involves the public at large. Indeed, this Court is being requested to answer whether a military department or Armed Service may override the clear wording of a law enacted by Congress and whether an Armed Service may disregard an agreement it has made with members of that Service.

CONCLUSION

The Memorandum Opinion of the District Court disregarded the clear meaning of 50 U.S.C. App. § 454(l)(1) and failed to attribute proper significance to the actions of the Air Force in "vacating" petitioners' earlier appointments as Air Force Reserve line officers and reappointing them as medical officers. These errors were perpetuated by the Court of Appeals in its judgment of affirmance.

Since the decision of the court below conflicts with a federal statute and with applicable decisions of this Court and other federal courts, petitioners seek review by writ of certiorari. There is involved here not only the liberty of the petitioners -- who are being held in the Air Force against their will -- but also that of many other medical officers similarly situated. Also, there is presented here the even more basic issue of whether the Armed Services and other executive agencies will be kept within the limits prescribed by Congress.

Therefore, petitioners request this Court to grant the writ of certiorari.

Respectfully submitted,

Robinson O. Everett

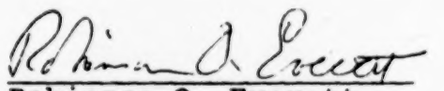
Neil B. Kabatchnick

Attorneys for Petitioners
Morrison, Galusha and
Graham

CERTIFICATE OF SERVICE

I certify that, pursuant to Supreme Court Rule 33, I have served the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit by mailing three copies, first class postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530, and three copies to the Honorable Earl V. Silbert, United States Attorney, United States Courthouse, Washington, D. C.

This 27th day of April, 1979.



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APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMIA CIRCUIT

No. 78-1247

Dr. John E. Morrison, Jr., et al.,
Appellants

v.

Honorable John Stetson,
Secretary of the Air Force,
Appellee

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, and ROBINSON and ROBB, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

This court is in agreement with the memorandum opinion filed February 1,

1978 by District Judge Oliver Gasch. (See Appendix at 76-85)

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court

/s/ George A. Fisher, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. 77-1415

John Morrison, et al.,
Plaintiffs,

v.

John Stetson,
Defendant.

ORDER

Upon consideration of the parties' cross-motions for summary judgment, the points and authorities filed in support and opposition thereto, the arguments of counsel in open Court, the entire record herein, and for the reasons set forth in the Court's Memorandum issued

this day, it is by the Court this 1st day of February, 1978.

ORDERED that defendant's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED that plaintiffs' motion for summary judgment be, and hereby is, denied; and it is further

ORDERED that plaintiffs' complaint be, and hereby is, dismissed.

/s/ OLIVER GASCH, Judge

MEMORANDUM

Presently before the Court are the parties' cross-motions for summary judgment. Plaintiffs are graduates of the Air Force Reserve Officers Training Corps ("AFROTC") program who are presently first lieutenant medical officers serving active duty in the Air Force. Plaintiffs seek a declaration that the four-year active duty commitment agreed to when they enrolled in the AFROTC program has been vacated and that they are required to serve only two years' active duty. For the reasons discussed below, the Court is not persuaded by plaintiffs' contentions and concludes that they remain obligated to serve four years' active duty.

FACTUAL BACKGROUND

The material facts underlying plaintiffs' claim are not in dispute.

During 1966 and 1967, each of the plaintiffs enrolled in approved AFROTC programs. At that time, they executed Air Force Form 1056, entitled "Air Force Reserve Officers Category Agreement," which represents a contractual agreement between each plaintiff and the Air Force.[1] The Agreement specifically provided that plaintiffs would be obligated to serve four years' active duty if they were commissioned as officers. The Agreement also provided that plaintiffs might be permitted to delay active duty until the completion of professional studies,[2] but it did not indicate whether an educational delay (and any subsequent recommissioning) would alter the four-year active duty requirement.

Following completion of the AFROTC program, each plaintiff received orders for appointments as second lieutenants in the Air Force Reserve. Each appointment was effectuated by means of an Appointment Letter, Oath of Office and Appointment Order.[3] Prior to the

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[1]Exhibit A-1 to Plaintiffs' Motion for Summary Judgment.

[2]Id., at Para. 8.

[3]Exhibits A-6, A-7, and A-8 to Plaintiffs' Motion for Summary Judgment (pertaining to plaintiff Morrison). Plaintiff Morrison received his Appointment Order in 1968, while plaintiffs Galusha and Graham received their Orders in 1969 and 1970, respectively. (The personnel files

*Footnote 3 continued:

pertaining to plaintiffs Galusha and Graham are contained in Defendant's Filing of December 12, 1977).

appointments, however, each plaintiff applied for and was granted an educational delay to study medicine before serving active duty. Upon completion of their studies, plaintiffs became eligible under Air Force regulations to be commissioned as medical officers. Accordingly, each plaintiff received an Appointment Letter, executed an Oath of Office, and received an Appointment Order commissioning him as a first lieutenant in the medical corps.[4] These Appointment Orders specifically provided that the earlier appointments as second lieutenant line officers were "vacated."

In 1975, Morrison was ordered to four years' extended active duty;[5] in 1976, Galusha and Graham were similarly ordered. Morrison already has served two years' active duty and claims that he should be released immediately. Galusha and Graham seek a declaration that they are entitled to release upon completion of two years' active duty.

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[4]Exhibits A-9, A-10, and A-11 to Plaintiffs' Motion for Summary Judgment. Plaintiffs Morrison and Galusha received their appointments as medical officers in 1973, and plaintiff Graham received his appointment in 1974.

[5]Exhibits A-12 and A-13 to Plaintiffs' Motion for Summary Judgment.

MERITS

Plaintiffs do not dispute that, by executing the "Category Agreement" when enrolling in the AFROTC program, they contractually committed themselves to serve four years' active duty if they were commissioned officers in the Air Force Reserve. Plaintiffs were commissioned officers upon their completion of the AFROTC program; thus, they are obligated to fulfill the four-year commitment unless they have in some way been excused from that commitment. Plaintiffs make two arguments in support of their claim that they have been excused from the four-year commitment: (a) Plaintiffs' appointment as medical officers, was intended also to vacate the four-year active duty obligation undertaken pursuant to the AFROTC program; and (b) active duty orders for medical officers in excess of two years are prohibited by statute. See 50 U.S.C. App. § 454(1)(1) (1970).

I. Intention of the Parties Regarding the Effect of Plaintiffs' Appointment as Medical Officers.

Plaintiffs initially argue that the Air Force intended to rescind plaintiffs' four-year active duty obligation when it appointed them first lieutenant medical officers. Evidence of such an intent on the part of the Air Force, to the extent that it does exist, most likely would be found in any of several places: the AFROTC Category Agreement;

the documents concerning the educational delay; the Order appointing each plaintiff a medical officer; and relevant Air Force Regulations and policy statements.

At the outset, it is clear that neither the Category Agreement nor the documents concerning the educational delay evidence any intent of the Air Force that plaintiffs' four-year active duty obligation would be rescinded if they were appointed medical officers following completion of medical studies. The Category Agreement does provide that plaintiffs could obtain an educational delay before commencing active duty.[6] The Agreement is completely silent, however, regarding the effect that appointment as a medical officer would have on the four-year active duty requirement.[7] The documents approving plaintiffs' request for an educational delay similarly are silent. Neither the applications for the delay nor the letters approving it discuss plaintiffs' potential appointment as medical officers

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[6] See note 2 supra.

[7] The Appointment Letter, Oath of Office, and Appointment Order effectuating each plaintiff's original appointment as second lieutenant line officers also give no indication regarding the effect that later appointment as a medical officer would have on the active duty obligation. See note 3 supra.

following completion of medical studies;[8] thus, they do not consider whether medical officer appointments would alter the four-year active duty obligation. There is no evidence that the parties, either at the time the original Agreement was executed or when the educational delay was approved, agreed that plaintiffs' later appointment as medical officers would rescind their four-year active duty commitment.

The critical issue therefore becomes whether the Air Force, when it appointed plaintiffs medical officers, intended to rescind the four-year active duty obligation. Plaintiffs contend that the statements in the Appointment Letter and Order specifically vacating each plaintiff's earlier appointment conclusively demonstrate that the Air Force intended to rescind the four-year obligation. The Court is not persuaded by plaintiffs' position. By themselves, the Appointment Letter and Order are at best inconclusive regarding the Air Force's understanding of the effect of vacating plaintiffs' earlier appointments. The Appointment Letter and Order make no reference to plaintiffs' active duty commitment.[9] It appears reasonable to the Court that had the Air Force intended the Appointment Order to rescind the four-year obligation, it would have specified in the Order or elsewhere

[8] See Exhibits A-4 and A-5 to Plaintiffs' Motion for Summary Judgment.

[9] See note 4 supra.

a new active obligation that would then become applicable.

More importantly, regardless of any conclusions about the Air Force's intent that might be drawn from the Appointment Order, the Air Force Regulations in effect at the time of plaintiffs' appointment as medical officers demonstrate conclusively that the Air Force did not intend to reduce plaintiffs' four-year obligation. AFR 45-48, pertaining to the AFROTC program, provides at paragraph forty-two that a "graduate must serve the period specified in the agreement under which he was originally appointed, even though he may later be reappointed (such as a commissioned officer in the Medical Corps . . .)."[10] Similarly, AFR 36-51, entitled "Active Duty Service Commitments (ADSC)," provides in pertinent part that officers commissioned through AFROTC who enter active duty as a physician or Medical Services Corps officer have a four-year ADSC.[11] These regulations confirm that the Air Force intended that AFROTC graduates recommissioned as medical officers would retain their four-year active duty commitment.

Plaintiffs respond that these regulations are not decisive because they

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[10]Defendant's Exhibit No. III.

[11]Defendant's Exhibit No. II, at Table 2, Rule 6, at note 4 and Rule 8, at note 5.

were not in effect when plaintiffs executed the Category Agreement or when they received approval for an educational delay.[12] Plaintiffs apparently argue that, even if the Air Force did not intend to rescind plaintiffs' four-year active duty obligation when it appointed them medical officers, the Air Force cannot hold plaintiffs to that obligation because the regulations in effect when plaintiffs executed the Category Agreement did not authorize a four-year obligation for AFROTC graduates recommissioned as medical officers. Without deciding whether the regulations in effect when plaintiffs signed the Category Agreement should even be considered controlling, the Court notes that these regulations apparently were silent concerning the active duty status of AFROTC graduates later commissioned as medical officers. Moreover, since 1964, Air Force policy clearly has been that medical officers who were AFROTC graduates retained their four-year obligation.[13]

The Court concludes that the Air Force, by appointing plaintiffs medical

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[12] The version of AFR 36-51 cited by defendant is dated December 29, 1972. Defendant's Exhibit No. II. The version of AFR 45-48 cited by defendant is dated June 20, 1973, but an earlier version of AFR 45-48 dated April 30, 1970, also contains the pertinent provision. Defendant's Exhibits No. III and IIIa.

[13] See Defendant's Exhibits No. VI and VIa.

officers, did not intend to rescind plaintiffs' four-year active duty obligation. The medical officer Appointment Order reflects no such intent; and both the regulations in effect when plaintiffs were appointed medical officers and the Air Force policy in effect when plaintiffs entered AFROTC provided that AFROTC graduates recommissioned as medical officers had a four-year active duty obligation.[14]

II. 50 U.S.C. App. § 454 as a Bar to Requiring Medical Officers to Serve Active Duty in Excess of Two Years.

Plaintiffs' second argument in support of their claim is that the Air Force is prohibited by statute from ordering plaintiffs, who are medical officers, to more than two years of active duty. Plaintiffs cite 50 U.S.C. App. § 454(l)(1) (1970), which provides

[14]The Court does not concur with the decision in Cooke v. Helder, No. S-2862 (E.D. Cal., filed July 30, 1973), which concluded that an AFROTC graduate's four-year active duty obligation was abrogated when he was recommissioned as a dental officer. While the court's reasoning in that decision is unclear, the court apparently relied on the fact that the regulation in effect at the time plaintiff was appointed as a dental officer did not specify that AFROTC graduates recommissioned after an educational delay would be held to their original four-year obligation.

in pertinent part:

> The President may order to active duty (other than for training) . . . for a period of not more than twenty-four consecutive months, with or without his consent, any member of a reserve component of the Armed Forces of the United States who is in a medical, dental, or allied specialist category, who has not attained the thirty-fifth anniversary of the date of his birth, and has not performed at least one year of active duty (other than for training).

On its face, the provision appears to support plaintiffs' position. The provision itself does not indicate, however, whether it extends to AFROTC graduates with a four-year commitment who are later appointed as medical officers. The Court concludes that a reading of the provision in context and an examination of its legislative history reveals that the provision was not intended to apply to medical officers who are AFROTC graduates

Section 454 (l)(1) codified section 2 of Public Law 85-62, 71 Stat. 206 (1957), which was enacted to continue many of the provisions of the "Doctor Draft Act."[15] The Senate Report, S.

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[15] Pub. L. 81-779, 64 Stat. 826 (1950).

Rep. No. 411, 85th Cong., 1st Sess. (1957), is especially instructive regarding the purpose of Public Law 85-62.[16] This law, like the Doctor Draft Act, authorized the President to make special draft calls for physicians under age thirty-five. This authority was necessary because the military's medical personnel needs could not be satisfied through the regular draft. Draft laws required that men under age twenty-six be selected first, but most doctors are past age twenty-six when they complete medical school. The Senate Report describes the purpose of the Act as authorizing the President

> . . . to issue special calls for physicians . . . who are otherwise liable under the regular draft. Under existing law the President has no authority to induct persons from among the various age groups on the basis of their professional or technical skill. The bill will provide such special authority with regard to physicians . . . It is expected that this legislation will operate in a manner similar to the doctor draft law under which commissions will be offered to all physicians . . . who are qualified to receive a commission.

[16] See Defendant's Exhibit No. V.

(Emphasis added). S. Rep. No. 411, supra, at 1.

Section 454(l)(1), upon which plaintiffs rely, simply authorizes the President to order to active duty doctors who would have been drafted had they not instead obtained commissions as medical officers. The Senate Report notes that section 454(l)(1) was considered necessary because

> [w]ithout this language there would be no specific Presidential authority for call of commissioned officers and the military services would have to rely solely on the moral commitment of the men to voluntarily enter active service after they had been given a commission.

S. Rep. No. 411, supra, at 4. Plaintiffs, however, had enrolled in AFROTC and expressly obligated themselves to four years' active duty. They would not be subject to any special draft call for doctors, and they cannot reasonably be viewed as within the group of commissioned officers intended to be affected by section 454(l)(1).

This conclusion if supported by section 454(1)(3). This provision provides that

> [a]ny person who is called or ordered to active duty . . .

> from a reserve component of the Armed Forces . . . and thereafter serves on active duty (other than for training) as a medical . . . specialist for a period of twelve months or more shall, upon release from active duty or within six months thereafter, be afforded an opportunity to resign his commission from the reserve component of which he is a member unless he is otherwise obligated to serve on active military training and service in the Armed Forces or in training in a reserve component by law or contract. (Emphasis added). 50 U.S.C. App. § 454(l)(3).

The qualifying clause at the end of the provision contemplates that medical officers may have active duty obligations pursuant to contractual agreements that are independent and separate from an active duty obligation imposed pursuant to section 454(l)(1).[17] Because section 454(l)(1) itself authorizes orders for up to two years' active duty, the qualifying language in section 454(l)(3) would be unnecessary unless it contemplated active duty obligations pursuant to contracts in

[17] Language in the Senate Report supports this reading of the qualifying clause. See S. Rep. No. 411, supra, at 6.

excess of two years. Plaintiffs, who were not ordered to active duty under section 454(l)(1), are the type of medical officers covered by the qualifying language.

The Court therefore concludes that plaintiffs' four-year active duty obligation is not prohibited by statute and has not been rescinded. Accordingly, the Court will deny plaintiffs' motion for summary judgment and grant defendant's motion for summary judgment.

/s/ OLIVER GASCH

Dated: February 1, 1978.

No. 78-1639

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN E. MORRISON, JR., ET AL., PETITIONERS

v.

JOHN C. STETSON, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend that the Air Force violated 50 U.S.C. App. (1970 ed.) 454(*l*)(1) in ordering them to active duty for four years rather than for two years.

1. Petitioners are United States Air Force medical officers who, during 1966 and 1967, while undergraduates, enrolled in the Air Force Reserve Officers Training Corps (AFROTC) (Pet. App. A-4). Each signed a contract with the Air Force which, in exchange for financial assistance, obligated him to serve four years' active duty if he was commissioned as an officer. Each agreement provided that the signer might be permitted to delay active duty pending completion of professional studies. The agreements contained no provision that such delay would in any way alter the four-year commitment (*ibid.*).

On completion of the AFROTC program, each petitioner was appointed a second lieutenant in the Air Force Reserve (Pet. App. A-4). Each petitioner applied for and was granted delay of active duty in order to study medicine (*id.* at A-6). After completing his studies, each petitioner became eligible under Air Force regulations to be commissioned a medical officer. Each petitioner accepted his commission and each was appointed a first lieutenant in the medical corps. The appointment orders stated that the earlier appointments as second lieutenant line officers were "vacated." In 1975 and 1976 each petitioner was ordered to serve four years' active duty (*ibid.*)

In 1977 petitioners filed an action in the United States District Court for the District of Columbia, alleging that their orders to four years' active duty violated 50 U.S.C. App. (1970 ed.) 454(*l*)(1).[1] That statute provided the President with the authority to order to active duty for a maximum of two years physicians under the age of 35 who are members of the reserve components of the Armed Forces. Petitioners also argued that because their original appointments had been vacated on their appointment to the medical corps, they were no longer obligated to serve their four-year commitments.

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[1] 50 U.S.C. App. (1970 ed.) 454(*l*)(1) provided in pertinent part:

> The President may order to active duty * * * for a period of not more than twenty-four consecutive months, with or without his consent, any member of a reserve component of the Armed Forces of the United States who is in a medical, dental, or allied specialist category, who has not attained the thirty-fifth anniversary of the date of his birth, and has not performed at least one year of active duty (other than for training).

All parties moved for summary judgment. In a thorough opinion on which we rely, the district court granted judgment to the Air Force (Pet. App. A-2 to A-17). The court found that there was no evidence to support petitioners' assertion that the Air Force by its actions intended to rescind the four-year obligation that petitioners had originally assumed (Pet. App. A-8, A-9). The court further concluded that Air Force regulations in force at the time of petitioners' medical appointments stated that persons in petitioners' circumstances would be held to their four-year commitments (*id.* at A-10, A-11). Moreover, Air Force policy was that medical officers such as petitioners retained their four-year AFROTC obligations (*id.* at A-11).

The court also rejected petitioners' argument based on 50 U.S.C. App. (1970 ed.) 454. The court held that, read in context and in light of its legislative history, that statute did not apply petitioners (Pet. App. A-12 to A-17). It therefore rejected petitioners' claim that their four-year active duty obligations were rescinded by the statute, and it granted summary judgment in favor of respondent (*id.* at A-17).

The court of appeals affirmed, relying on the district court's opinion (Pet. App. A-1 to A-2).

2. The decision of the lower courts is correct and does not conflict with any decision of this Court or any Court of Appeals. As the district court found, the Air Force never had any intention of modifying the four-year obligation that petitioners assumed in exchange for government assistance. On the contrary, applicable Air Force regulations and policy stated that those in

petitioners' position would be held to their original obligations when their delays for professional training had expired (Pet. App. A-10 to A-11).[2]

The court's conclusion concerning 50 U.S.C. App. (1970 ed.) 454(*l*)(1) also is correct. The Senate Report (S. Rep. No. 411, 85th Cong., 1st Sess. (1957)) explains without ambiguity that this statute was not intended to affect persons who, like petitioners, had an independent obligation to serve on active duty. Moreover, the statute expired by its terms on July 1, 1973, before petitioners received their commissions. See Act of June 27, 1957, Pub. L. No. 85-62, Sections 2, 9, 71 Stat. 206, 208, as amended by the Act of Sept. 28, 1971, Pub. L. No. 92-129, Section 103, 85 Stat. 355. It therefore had no effect on their cases, and its interpretation does not present any question of continuing importance.

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[2]Petitioners rely on a 1963 Air Force message, which stated that later appointment to a medical position abrogated the four-year AFROTC obligation (Pet. 10). This message was purportedly based on the provisions of the Act of Apr. 30, 1956, Pub. L. No. 84-497, 70 Stat. 119, which was passed to "increase the attractiveness of a service career for medical and dental officers." H.R. Rep. No. 1806, 84th Cong., 2d Sess. 1 (1956). After further study, however, the Air Force circulated a message in 1964 which clearly stated that the four-year obligation remained and was not abrogated (see Exhibit Volume To Court of Appeals Appendix 150, 151). Petitioners did not enroll in the AFROTC until 1966 and 1967, and thus they are in no position to claim an advantage under the 1963 message. In 1967, before any petitioner requested a delay of active duty to attend medical school, the Air Force Director of Medical Staffing and Education wrote to the Chief of Staff that Pub. L. No. 84-497 did not affect the four-year commitment that petitioners had accepted, and that appointment of a newly graduated physician to the medical corps did not remove the four-year service obligation (See Exhibit Volume 149).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

DOJ-1979-06

No. 78-1639

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

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JOHN C. STETSON, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONERS TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the final paragraph of the Memorandum for the Respondent, the Government states that the Senate Report (S. Rep. No. 411, 85th Cong. 1st Sess. (1957) "explains without ambiguity that this statute was not intended to affect persons who, like petitioners, had an independent obligation to serve on active duty". Upon reexamination of the Senate Report, we are still unable to find any "explanation" to this effect

or even any mention of those who had some independent obligation to serve on active duty. Apart from the plain language of the statute, petitioners have contended from the outset that the failure of the legislative history to create some exception for persons who had an independent obligation to serve reveals unmistakably that the Congress had no such intention.

The Government also suggests that 50 USC App. (1970 ed.) 454(1)(1) had expired "before petitioners received their commissions". This is the first time during this litigation that such a suggestion has been made by the Government. As the record shows, petitioners "received their commissions" in 1969 or 1970, long before 1973 when the Government claims the statute expired. Thereafter they were allowed educational delay for several years. Moreover, petitioner Morrison was offered appointment as a medical officer on June 14, 1973, which was to take effect on acceptance. The acceptance occurred on July 1, 1973, according to Air Force records that were exhibits in the case.

The question of statutory interpretation is of great importance because (a) the restriction on ordering medical or dental specialists to active duty was not intended by the Congress to expire on July 1, 1973, and (b) even if it were intended to expire on that date, there are many present and former Air Force medical and dental officers who would be entitled to extra pay if they were order to active duty for four years when their service obligation was only two years.

It is respectfully submitted that the petition for certiorari should be granted.

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CERTIFICATE OF SERVICE

I have this day mailed two copies of this reply to the Solicitor General at his office address in Washington.

This 1st day of August, 1979.

James B. Craven III
James B. Craven III